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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6668
COMPLAINT FILED: October 24, 2012
LAST RESPONSE RECEIVED: January 8, 2013
ACTIVATED: February 27, 2013

EARLIEST SOL: September 1, 2017
LATEST SOL: October 15, 2017
ELECTION CYCLE: 2012

COMPLAINANT:

Bruce Buettell

RESPONDENTS:

Jay Chen for Congress and Samuel Liu in
his official capacity as treasurer

Jay Chen

America Shining and Tara Geise in
her official capacity as treasurer

Shaw Chen

Mailing Pros, Inc.

RELEVANT STATUTES:

2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant alleges that America Shining, an independent-expenditure-only political committee, made impermissible in-kind contributions to Congressional candidate Jay Chen in the months leading up to the 2012 general election by coordinating three direct mailings through a

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1 common vendor, Mailing Pros, Inc. ("Mailing Pros").¹ Complainant also alleges that America
2 Shining violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by making
3 the contributions to Chen's principal campaign committee with funds raised in unlimited
4 amounts for the purpose of making independent expenditures.

5 Respondents deny that there was any coordination. Specifically, Respondents assert that
6 Mailing Pros's connection with Chen's committee and America Shining was too limited to give
7 Mailing Pros access to information that could result in coordination. The Response submitted by
8 America Shining and Shaw Chen (the primary contributor to America Shining, and brother of
9 Jay Chen) includes sworn declarations supporting this assertion and attesting to the nature of
10 their relationship with the other Respondents.

11 Based on the information in the Complaint and the Responses, none of the three direct
12 mailings satisfies the Commission's coordinated communications regulation. One of the
13 communications fails to satisfy the payment prong of that regulation. The other two
14 communications fail to satisfy the conduct prong. Accordingly, we recommend that the
15 Commission find no reason to believe that any Respondents made or accepted excessive or
16 prohibited in-kind contributions as a result of the mailers. We further recommend that the
17 Commission find no reason to believe that America Shining violated the Act by raising funds in
18 unlimited amounts.

¹ The Complaint names Mailing Pros as a Respondent without alleging that it violated the Act; rather, the Complaint asserts that the other Respondents coordinated communications through Mailing Pros. Although Mailing Pros is a named Respondent, there is no record evidence that it violated the Act. Accordingly, we have included a recommendation for its disposition.

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II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Jay Chen was an unsuccessful candidate for the U.S. House of Representatives from California's 39th Congressional District during the 2012 election cycle. His principal campaign committee is Jay Chen for Congress and its treasurer is Samuel Liu (collectively, "Chen Committee").

America Shining is an independent-expenditure-only political committee founded to "support Asian American candidates for federal office." Ravi Krishnaney Decl. ¶ 1 (Dec. 18, 2012). As of its 2012 Year-End Report, Shaw Chen had contributed \$765,000 of the \$1,115,000 America Shining received in individual contributions since its formation. Most, but not all, of America Shining's independent expenditures have been made in support of Jay Chen or against his opponent, Ed Royce.² See Independent Expenditure Reports (Aug. 25, 2012 – Nov. 5, 2012).

Between early September and mid-October 2012, the Chen Committee distributed a mailer advocating for Chen's election and bearing the postmark, "US POSTAGE PAID MAILING PROS INC." Compl. at 3 (Oct. 24, 2012); *id.*, Ex. 3. The mailer features Chen's image and states, "Jay Chen for Congress. New Leadership. New Ideas." *Id.*, Ex. 3.

During the same time period, America Shining distributed two mailers bearing the same "MAILING PROS INC." postmark. Compl. at 3; *id.*, Exs. 1-2. The first discussed Royce's votes on Medicare and included the statement, "Ed Royce. The Wrong Voice. The Wrong Choice." *Id.*, Ex. 1. The second featured an image of Jay Chen and the statement, "Small Businessman Jay Chen for Congress. A New Leader. A Brighter Future. Vote Jay Chen for Congress on Tues., Nov. 6." *Id.*, Ex. 2.

² America Shining disclosed a total of \$1,055,660 in independent expenditures for the 2012 election cycle, of which \$1,049,518 were made in support of Chen or in opposition to Royce.

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Both committees' disclosure reports reveal several disbursements during this time period for the purpose of direct mail, but do not disclose any disbursements to Mailing Pros or any other shared direct mail vendor. Based on the common postmark, however, and noting that Jay and Shaw Chen are brothers, Complainant alleges that Respondents violated the Act by coordinating the three mailers. Compl. at 2-5. Respondents all deny that any coordination occurred.

Jay Chen and the Chen Committee argue that Mailing Pros does not qualify as a common vendor for the purpose of the Commission's coordination regulation.³ The Chen Committee asserts that Mailing Pros was merely a sub-vendor hired by one of its mail consultants, and thus the Chen Committee has had no communication with Mailing Pros.⁴ Chen Comm. Resp. at 1 (Jan. 8, 2013); Jay Chen Resp. at 1 (Dec. 18, 2012). The Responses claim that Mailing Pros does not provide any of the services that would subject it to common vendor status since it does not participate in any "strategy or design work." Jay Chen Resp. at 1. Instead, Mailing Pros is allegedly responsible only for "(1) printing mail pieces produced by Baughman⁵ in Washington D.C.; (2) printing on mailing addresses from a list provided by Baughman; [and] (3) delivering the completed mailers to the nearest post office." *Id.* at 3. Further, the Responses assert that Mailing Pros's entire process is completed within a few days, meaning that Mailing Pros is only aware of the mail campaign for a short time before it becomes public, thereby "limiting any strategic value [Mailing Pros] possesses." *Id.* at 2. Finally, the Responses contend that there is

³ Jay Chen and the Chen Committee filed separate Responses. See Jay Chen Resp. (Dec. 18, 2012); Chen Comm. Resp. (Jan. 8, 2013). The Chen Committee Response incorporates Jay Chen's Response by reference. Chen Comm. Resp. at 1.

⁴ Jay Chen asserts that he was unaware that Mailing Pros was a sub-vendor of the Chen Committee until he learned of the Complaint in this matter. Jay Chen Resp. at 1.

⁵ Baughman is a political advertising firm. The Chen Committee's 2012 October Quarterly and Pre-General Reports disclose a total of seven disbursements to "The Baughman Co." for the purposes of "mailers and postage," "mail production and postage," and "design/copy production/postage of mail piece."

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1 no evidence that Mailing Pros conveyed any of the Chen Committee's plans to America Shining,
2 noting that the mail pieces at issue do not share any common language or content. *Id.*

3 America Shining and Shaw Chen submitted a joint Response ("America Shining
4 Response"), including sworn declarations from Shaw Chen and Ravi Krishnaney, the president
5 and founder of America Shining. The America Shining Response echoes the Chen Committee
6 Response: It states that Mailing Pros did not participate in the creative process or participate in
7 any decisions relating to the funding or targeting of the mailings, and therefore was not in a
8 position to convey any information between the Chen Committee and America Shining.
9 America Shining Resp. at 2-3 (Dec. 21, 2012). Krishnaney specifically attests that: (1) Mailing
10 Pros did not provide any strategic services to America Shining, but rather was used solely as a
11 printer; (2) Mailing Pros did not convey any information regarding the Chen Committee to
12 America Shining; (3) before receiving the Complaint, Krishnaney was unaware that Mailing Pros
13 was also a vendor of the Chen Committee; and (4) no non-public information regarding the
14 plans, projects, or needs of the Chen Committee were communicated to himself or any other
15 agent of America Shining. Krishnaney Decl. ¶¶ 4-6.

16 The America Shining Response also specifically addresses the familial relationship
17 between its primary donor, Shaw Chen, and the candidate it supported, Jay Chen. The Response
18 claims that no coordination took place between Shaw and Jay Chen, and argues that "the mere
19 fact that Shaw Chen is Jay Chen's brother, does not implicate any portion of the Commission's
20 coordination regulations." America Shining Resp. at 2-3. Krishnaney attests that America
21 Shining approached Shaw Chen for funding, and did not discuss this approach with Jay Chen or
22 any other agent of the Chen Committee. Krishnaney Decl. ¶ 2. Furthermore, Shaw Chen attests
23 that:

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- 1 • He did not discuss his intent to contribute to America Shining with his brother or any
2 employee or agent of the Chen Committee. Shaw Chen Decl. ¶ 3 (Dec. 15, 2012).
3
- 4 • Although Shaw Chen was occasionally shown America Shining's draft materials, he "did
5 not provide any significant substantive feedback," did not participate in creation or
6 substance of the advertisements, and did not participate in the management of the
7 committee. *Id.* ¶ 4.
8
- 9 • Shaw Chen did not learn of any non-public information regarding the Chen Committee's
10 projects, needs, or plans through discussions with his brother or any agent or employee of
11 the Chen Committee. *Id.* ¶ 6.

12 Mailing Pros disputes that it is a company "running mail campaigns," as the Complaint
13 claims. Mailing Pros Resp. at 4 (Nov. 16, 2012). Rather, Mailing Pros explains, it focuses on
14 mail addressing and processing as well as postage and postal service requirements, but does not
15 engage in printing or list acquisition. *Id.* at 2. It performs services such as inserting addresses
16 (provided by the customer) onto pre-printed mail pieces and attaching its bulk mail postal permit
17 marker (*e.g.*, "US Postage Paid, Mailing Pros, Inc."), but "does not determine what to say, how
18 to convey it, or to whom to say it." *Id.* at 2-4.

19 **B. Legal Analysis**

20 Expenditures made by any person in cooperation, consultation, or concert with, or at the
21 request or suggestion of a candidate, the candidate's authorized political committees, or agents,
22 are considered noncontributions to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays
23 for a communication that is coordinated with a candidate or his or her authorized committee, the
24 communication is considered an in-kind contribution from the person to that candidate and is
25 subject to the limits, prohibitions, and reporting requirements of the Act. 11 C.F.R. § 109.21(b);
26 *see also* 2 U.S.C. § 441a(a).

27 A communication is coordinated with a candidate, authorized committee, or agent thereof
28 if it meets a three-prong test set forth in the Commission regulations: (1) it is paid for, in whole
29 or in part, by a person other than the candidate or authorized committee; (2) it satisfies one of

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1 five content standards in 11 C.F.R. § 109.21(c);⁶ and (3) it satisfies one of six conduct standards
2 in 11 C.F.R. § 109.21(d).⁷ 11 C.F.R. § 109.21(a).

3 In this matter, the mailer sent by the Chen Committee does not satisfy the first prong of
4 the coordination test. *See* 11 C.F.R. § 109.21(a)(1). The Complaint does not allege that the
5 Chen Committee's mailer was paid for to any extent by America Shining or any other person;
6 indeed, as the Complaint acknowledges, the mailer clearly states that it was paid for by the Chen
7 Committee. Compl. at 4, Ex. 3.

8 The two mailers sent by America Shining satisfy the payment and content prongs of the
9 coordination test, but fail the conduct prong. America Shining does not deny that it paid for its
10 mailers. *See generally* America Shining Resp.; *see* 11 C.F.R. § 109.21(a)(1). And the content
11 prong is satisfied because both mailers contain express advocacy or its functional equivalent,⁸
12 and, alternatively, both clearly identify a House candidate and were publicly distributed in the
13 relevant jurisdiction within 90 days of the 2012 general election. *See* 11 C.F.R.
14 § 109.21(c)(3)-(5).

15 But despite Complainant's allegations, there is no information suggesting that either
16 America Shining mailer satisfies any of the six conduct standards of 11 C.F.R. § 109.21(d). And
17 the Complaint specifically highlights that Jay and Shaw Chen are brothers, implying that this

⁶ The following types of content satisfy the content prong: (1) electioneering communications; (2) public communications that disseminate, distribute, or republish campaign materials; (3) public communications containing express advocacy; (4) public communications that refer to a clearly identified federal candidate or political party within the relevant jurisdiction during a specified time period preceding the election; and (5) public communications that are the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

⁷ The following types of conduct satisfy the conduct prong: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee or independent contractor; and (6) dissemination, distribution, or republication of campaign material. 11 C.F.R. § 109.21(d).

⁸ The first American Shining mailer contains the statement, "Ed Royce. The Wrong Voice. The Wrong Choice." Compl., Ex. 1. The second mailer states, "Vote Jay Chen for Congress on Tues., Nov. 6." *Id.*, Ex. 2; *see also supra* p.3.

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1 familial relationship aided the coordination alleged. Compl. at 2. But neither of these
2 allegations satisfies the conduct prong.

3 1. Common Vendor

4 The conduct prong is satisfied under section 109.21(d)(4) where: (1) the person paying
5 for the communication, or his agent, contracts with or employs a commercial vendor⁹ to create,
6 produce, or distribute a communication; (2) that commercial vendor has provided any of several
7 enumerated services¹⁰ to the candidate who is clearly identified in the communication, or the
8 candidate's opponent, during the past 120 days; and (3) that commercial vendor uses or conveys
9 to the person paying for the communication information about the campaign plans, projects,
10 activities, or needs of the clearly identified candidate (or his opponent, as the case may be), and
11 that information is material to the creation, production, or distribution of the communication.

12 11 C.F.R. § 109.21(d)(4).

13 Here, the facts here fail to establish that the second or third requirements are satisfied. As
14 to the second requirement, there is no information that Mailing Pros provided any of the services
15 specifically enumerated in the Commission's regulation.¹¹ Mailing Pros did not participate in
16 media strategy, develop mailing lists, or consult on the content of the mailers; it merely affixed

⁹ "Commercial vendor" is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." 11 C.F.R. § 116.1(c).

¹⁰ The following activities comprise the enumerated services: development of media strategy, including the selection or purchasing of advertising slots; selection of audiences; polling; fundraising; developing the content of a public communication; producing a public communication; identifying votes or developing voter lists, mailing lists, or donor lists; selecting personnel, contractors, or subcontractors; and consulting or otherwise providing political or media advice. 11 C.F.R. § 109.21(d)(4)(ii)(A)-(I).

¹¹ The second requirement is dependent not on whether America Shining directly employed Mailing Pros, but rather the specific services that Mailing Pros provided to the Chen Committee. See 11 C.F.R. § 109.21(d)(4)(ii).

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1 the provided addresses and its bulk-mailing postmark to the pre-printed mailers,¹² and delivered
2 the mailers to the post office. Jay Chen Resp. at 1-3; Mailing Pros Resp. at 2-4. Under these
3 circumstances, Mailing Pros cannot be said to have participated in the “production” of the
4 mailer. *See Factual & Legal Analysis*, MUR 6050 (Boswell for Congress) at 8 (“The mere fact
5 that [Respondents] used two common vendors . . . is noteworthy and accounts for the fact that
6 the mailers contain the same postage permit number and indicia; but it is not sufficient to
7 establish coordination by itself.”).

8 Furthermore, the Complaint fails to present any information indicating that Mailing Pros
9 used or conveyed to America Shining any information regarding Jay Chen or the Chen
10 Committee, much less information material to the creation, production, or distribution of the
11 mailers. On the contrary, Krishnaney specifically attests that no such conveyance occurred.
12 Krishnaney Decl. ¶ 5. In sum, the common vendor standard is not satisfied.

13 2. Family Relationship

14 The Complaint points out that Jay and Shaw Chen are siblings. Compl. at 2. But a
15 familial relationship — standing alone — is not a sufficient basis to find reason to believe that
16 coordination took place. *See, e.g.*, First Gen. Counsel’s Rpt., MUR 6277 (Kirkland) (resulting in
17 an insufficient number of votes for a reason to believe finding); First Gen. Counsel’s Rpt.,
18 MUR 6611 (Friends of Laura Ruderman, *et al.*) (“Ruderman”) (resulting in an insufficient
19 number of votes for both no reason to believe and reason to believe findings). *But see* Statement
20 of Reasons, Comm’rs. Weintraub, Bauerly, & Walther at 1, MUR 6611 (Ruderman) (“These
21 facts raise a troubling issue that the Commission has yet to squarely address: when a person with

¹² Although the Chen Committee states that Mailing Pros was used as a printer, *see supra* p.4, this statement appears to reflect a misunderstanding on the part of the Chen Committee as to whether its direct mail consultant or Mailing Pros actually performed the printing services. Mailing Pros’s detailed explanation of its services explicitly states that it does not perform printing services. Mailing Pros Resp. at 2. This inference is also supported by the fact that the Chen Committee does not contract directly with Mailing Pros. Jay Chen Resp. at 2-3.

1 a close relationship to a candidate establishes a nominally independent political committee
2 supporting that candidate . . . we believe that the Commission has a responsibility to closely
3 scrutinize the record to determine whether the alleged coordination took place.”).¹³

4 In the present matter, the Complaint does not allege, and there is no information
5 evidencing, any discussion, participation, or other activity between the Chen brothers that might
6 satisfy the conduct prong. Furthermore, Shaw Chen specifically attests otherwise — his
7 declaration states that he did not learn any non-public information regarding the Chen
8 Committee’s projects, needs, or plans through discussions with his brother or any other agent of
9 his campaign committee, and that he did not discuss his intent to contribute to America Shining
10 with his brother or anyone else from the Chen Committee. Shaw Chen Decl. ¶¶ 3-6.

11 Accordingly, there is no information suggesting that Jay and Shaw Chen engaged in any activity
12 that would satisfy the conduct prong of the Commission’s coordination regulation.

13 **C. Conclusion**

14 The available information does not indicate that America Shining coordinated its
15 communications with, and thereby made an in-kind contribution to, the Chen Committee. Thus,
16 there is no basis for the Complaint’s contention that America Shining has violated the Act by
17 raising funds in unlimited amounts for independent expenditures.

18 We recommend that the Commission find no reason to believe that America Shining and
19 Shaw Chen violated 2 U.S.C. § 441a(a) by making excessive contributions; find no reason to
20 believe that the Chen Committee and Jay Chen violated 2 U.S.C. § 441a(f) by accepting
21 excessive or prohibited contributions; find no reason to believe that America Shining violated

¹³ In order for a decision of the Commission on a MUR to have precedential effect, the decision must have garnered the support of four or more Commissioners. Put differently, a 3-3 vote results in no precedent. *See, e.g.*, 2 U.S.C. § 437g(a)(2) (reason to believe finding by the Commission requires “an affirmative vote of 4 of its members”).

2 U.S.C. § 441a(f) by accepting excessive contributions; and find no reason to believe that

Mailing Pros violated the Act.

III. RECOMMENDATIONS

1. Find no reason to believe that Shaw Chen and America Shining and Tara Geise in her official capacity as treasurer violated 2 U.S.C. § 441a(a).
2. Find no reason to believe that Jay Chen and Jay Chen for Congress and Samuel Liu in his official capacity as treasurer violated 2 U.S.C. § 441a(f).
3. Find no reason to believe that America Shining and Tara Geise in her official capacity as treasurer violated 2 U.S.C. § 441a(f).
4. Find no reason to believe that Mailing Pros, Inc. violated the Act.
5. Approve the attached Factual and Legal Analysis.
6. Approve the appropriate letters.

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7. Close the file.


Anthony Herman
General Counsel

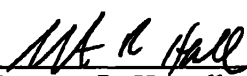
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